Omya (M) Sdn Bhd v Noble Distinction (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–2375–09 OF 2011

B

ABDUL WAHAB PATAIL, MAH WENG KWAI AND TENGKU MAIMUN JJCA

24 SEPTEMBER 2013

C

Civil Procedure — Appeal — Appellate interference — Whether insufficient judicial appreciation of evidence — Whether proper case for appellate intervention

Civil Procedure — Interest — Judgment interest — Whether High Court erred in ordering interest of 8% on judgment sum — Whether interest on judgment sum only allowable at 4%pa

D

Contract — Breach — Agreement — Agreement for extraction and removal of rock materials from land — Whether appellant in breach of agreement by failing to pay for extracted materials

E

The respondent entered into a supply agreement with Samarkali (M) Sdn Bhd ('Samarkali') where Samarkali, as the land owner, agreed to permit the respondent to extract and remove rock materials from two pieces of land. Subsequently, Samarkali sold the lands to the appellant. The respondent filed a suit against the appellant seeking RM3,647,347.08 being payment for 911,836.76 cubic tonnes of limestone extracted by the respondent but not removed from the said land. The respondent's cause of action was based on the supply agreement, which after the sale of the lands by Samarkali to the appellant, the appellant was said to have stepped into the shoes of Samarkali. The learned judicial commissioner ('JC') gave judgment in favour of the respondent for the sum of RM2,279,591.90 with interest at the rate of 8%pa. The appellant filed this appeal contending that the JC failed to appreciate the fact that under the supply agreement between the respondent and Samarkali, the respondent had to make payments to Samarkali in consideration of Samarkali permitting the respondent to extract and remove limestone and rock materials from the said lands. Hence, if the supply agreement was continued or adopted by the appellant, then it would be the respondent who would have to make payments to the appellant.

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Held, allowing the appeal with costs:

(1) The relationship between the respondent and Samarkali was different

from the relationship between the respondent and the appellant. As between the respondent and Samarkali, under the supply agreement, Samarkali granted the respondent a licence to extract and remove rock materials from the land, at the respondent's own expenses and upon payment to Samarkali. The respondent also had to pay Samarkali various other payments for the marble and rock materials removed from the land. No payment was payable by Samarkali to the respondent. After the appellant was registered as the proprietor of the land, the respondent was allowed to enter the land and extract mineral on payment of tribute and premium to the appellant (see paras 7–8 & 11).

(2) In respect of the quantum of 119,836.76 cubic tonnes of limestone purportedly left on the said lands, the JC failed to appreciate the facts and the evidence on the nature of the relationship between the appellant and the respondent and had failed to consider the evidence of SP5 who did not provide proof on the quantum of the limestone pleaded by the respondent (see paras 13 & 16).

(3) Given the insufficient judicial appreciation of the evidence, this was a proper case for appellate intervention (see para 17).

(4) The interest awarded by the learned JC was wrong in law. The judgment was dated 18 August 2011 by which time the law has been amended to provide for interest on judgment sum at the rate of 4%pa (see para 17).

[Bahasa Malaysia summary

Responden memasuki perjanjian pembekalan dengan Samarkali (M) Sdn Bhd ('Samarkali') di mana Samarkali, sebagai pemilik tanah, bersetuju untuk membenarkan responden untuk mengekstrak dan mengangkut material batu daripada dua bidnag tanah. Kemudiannya, Samarkali menjual tanah tersebut kepada perayu. Responden memfailkan guaman terhadap perayu memohon RM3,647,347.08 sebagai bayaran untuk 911,836.76 tan padu batu kapur yang diekstrak oleh responden tetapi diangkut daripada tanah tersebut. Kausa tindakan responden adalah berdasarkan perjanjian pembekalan, di mana selepas jualan tanah oleh Samarkali kepada perayu, perayu dikatakan mengambil tempat Samarkali. Pesuruhjaya kehakiman ('PK') memberi penghakiman memihak responden untuk sejumlah RM2,279,591.90 dengan faedah pada kadar 8% setahun. Perayu memfailkan rayuan ini berhujah bahawa PK gagal untuk menilai fakta bahawa di bawah perjanjian pembekalan di antara responden dan Samarkali, responden telah membuat bayaran kepada Samarkali dalam balasan Samarkali membenarkan responden untuk mengekstrak dan mengangkut batu kapur dan material batu daripada tanah tersebut. Maka, jika perjanjian pembekalan diteruskan atau digunakan oleh perayu, dengan itu adalah responden yang akan membuat bayaran kepada perayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hubungan di antara responden dan Samarkali adalah berbeza daripada

hubungan di antara responden dan perayu. Di antara responden dan Samarkali, di bawah perjanjian pembekalan, Samarkali memberikan responden lesen untuk mengekstrak dan mengangkut material batu daripada tanah tersebut, pada perbelanjaan responden sendiri dan selepas bayaran kepada Samarkali. Responden juga perlu membayar Samarkali pelbagai bayaran yang lain untuk marmar dan material batu yang diangkut daripada tanah. Tiada bayaran perlu dibayar oleh Samarkali kepada responden. Selepas perayu didaftarkan sebagai pemilik tanah tersebut, responden dibenarkan untuk memasuki tanah dan mengekstrak mineral atas tanda bayaran dan premium kepada perayu (lihat perenggan 7–8 & 11).

(2) Berkaitan kuantum 119,836.76 tan padu batu kapur yang dikatakan ditinggalkan di atas tanah tersebut, PK gagal untuk menilai fakta dan keterangan atas sifat hubungan di antara perayu dan responden dan gagal untuk mempertimbangkan keterangan SP5 yang tidak memberikan bukti atas kuantum batu kapur yang diplidkan oleh responden (lihat perenggan 13 & 16).

(3) Dengan penilaian kehakiman yang tidak mencukupi terhadap keterangan, ini adalah kes yang wajar untuk campur tangan mahkamah rayuan (lihat perenggan 17).

(4) Faedah yang diawardkan oleh PK yang bijaksana adalah salah dari segi undang-undang. Penghakiman adalah bertarikh 18 Ogos 2011 di mana pada masa tersebut undang-undang telah dipinda untuk memperuntukkan faedah ke atas jumlah penghakiman pada kadar 4% setahun (lihat perenggan 17).]

Notes

For a case on judgment interest, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 4253.

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3106–3137.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Appeal from: Civil Suit No (M1)22–133 of 2007 (High Court, Ipoh)

Christoper Leong (Goh Toh Jen, Shamela Balasundaram and Tan Hui Xian with him) (TJ Goh & Co) for the appellant.

EP Seeralasittan (Chong & Poh) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The respondent Noble Distinction (M) Sdn Bhd entered into a supply agreement with Samarkali (M) Sdn Bhd ('Samarkali') where Samarkali, as the land owner, agreed to permit the respondent to extract and remove rock materials from two pieces of land. By two sale and purchase agreements, Samarkali sold the two pieces of land to the appellant Omya Malaysia Sdn Bhd.

[2] The respondent filed a suit against the appellant in the High Court seeking RM3,647,347.08. The claim is for payment of 911,836.76 cubic tonnes of limestone at RM4 per cubic tonne, extracted by the respondent but not removed from the said land. The respondent's cause of action is based on the supply agreement with Samarkali for the extraction and removal of the limestone, after which pursuant to the sale of the land by Samarkali to the appellant, the appellant was said to have stepped into the shoes of Samarkali.

[3] The learned judicial commissioner found that:

(a) the respondent's claim was for work done at the appellant's limestone quarry on the land from the time the appellant purchased the land from Samarkali until the respondent ceased work on 15 April 2006;

(b) the appellant had stated in a letter dated 14 April 2005 to the respondent that subsequent to the purchase by the appellant, all terms and conditions remained the same save that tribute and premium payments would have to be made to the appellant;

(c) the respondent had direct dealings with the appellant after the purchase of the land by the appellant until about 30 April 2006;

(d) the respondent had proved that limestone weighing 911,836.76 cubic tonnes were left at the quarry based on a joint inspection conducted by the respondent and the appellant;

(e) the value of the limestone was RM2.50 per metric tonne; and

(f) in the course of its work at the quarry, the respondent had covered up ponds and built access roads which profited the appellant.

[4] Judgment was entered in favour of the respondent for the sum of RM2,279,591.90 (RM2.50 x 911,836.76 cubic tonnes) with interest at the rate of 8%pa from 23 June 2006 until the date of judgment ie 18 August 2011 and at 8%pa from the date of judgment until realisation.

[5] Dissatisfied with the decision, the appellant filed this appeal. In essence,

the appellant's complaint is that the learned judicial commissioner failed to appreciate and address the fact that under the supply agreement between the respondent and Samarkali, the respondent had to make payments to Samarkali in consideration of Samarkali permitting the respondent, at the respondent's request, to extract and remove limestone and rock materials from the said land. If, as pleaded by the respondent, the supply agreement was continued or adopted by the appellant, then it would be the respondent who would have to make payments to the appellant. The respondent could not have sought payment from the appellant.

[6] We have allowed the appeal with costs of RM70,000 here and below and we set aside the order of the High Court. We made a further order that RM3,205,179.26 paid by the appellant to the respondent be paid back to the appellant within seven days of the date of the order with interest thereon at the rate of 4% from 19 April 2012. Our reasons are as follows.

[7] From the documentary evidence and the oral evidence of the witnesses, it is clear that the relationship between the respondent and Samarkali is different from the relationship between the respondent and the appellant.

[8] As between the respondent and Samarkali, under the supply agreement, Samarkali granted the respondent a licence to extract and remove rock materials from the land, at the respondent's own expenses and upon payment to Samarkali. The respondent also had to pay Samarkali various other payments for the marble and rock materials removed from the land. No payment was payable by Samarkali to the respondent.

[9] The respondent wanted the marble and rock materials for commercial purposes. During the term of the supply agreement between the respondent and Samarkali, the appellant was one of the purchasers of 6 x 9 inches of crushed and washable limestone from the respondent. This was an ad hoc arrangement between the appellant and the respondent which had nothing to do with the supply agreement.

[10] When the appellant purchased the land from Samarkali, the appellant wanted to exploit the mineral reserves on the land. To find a suitable quarry contractor, the appellant conducted an open tender exercise. The respondent was one of the contractors who submitted the tender bid but it was not successful.

[11] After the appellant was registered as the proprietor of the land and as the tender exercise commenced and progressed, the respondent was allowed to enter the land and extract mineral on payment of tribute and premium to the appellant. In the meantime, the arrangement on the purchase of the crushed

and washable limestone by the appellant from the respondent continued. The appellant paid for the crushed and washable limestone by setting off against the payment by the respondent for the tribute and premium.

[12] After the tender contract was awarded to the successful company and the respondent handed over the site to the appellant, the respondent issued a letter dated 24 April 2006 to the appellant. Vide the letter the respondent had set out the stock pile at the quarry totalling RM217,211.85. SP4 admitted that this sum has been paid by the appellant.

[13] In respect of the quantum of 119,836.76 cubic tonnes of limestone purportedly left on the said land, the respondent pleaded that this was revealed by the survey plan. The learned judicial commissioner accepted the respondent's case and made a finding that the quantum was based on a joint inspection. The evidence however show otherwise.

[14] The surveyor, SP5 gave evidence that the survey plan (exh P7) was not his actual survey plan and it was not signed by him or anyone. According to SP5, the calculation stated in exh P7 was not made by him but it was based on hypothetical information provided by SP3 to his (SP5) staff and was superimposed on exh P7 at the request of SP3. The original survey plan prepared by him (exh D25) did not contain such hypothetical calculation. SP5 further said that he was not able to and it is not within the competency of any surveyor to ascertain the amount of limestone deposited underground. In fact the notes of proceedings contain the following remarks by the learned judicial commissioner 'Court appears something is very wrong somewhere'.

[15] The respondent pleaded that from the survey plan, the areas where the volume of limestone were deposited were Areas 1–3. The evidence of SP1 revealed that Area 1 was a pond filled by the respondent with debris and ordinary rocks which were done since 1992 to enable the respondent to access the land. The evidence thus established that there was no limestone deposited in Area 1.

[16] The learned judicial commissioner failed to appreciate the facts and the evidence on the nature of the relationship between the appellant and the respondent and had failed to consider the evidence of SP5 who did not provide proof on the quantum of the limestone pleaded by the respondent. The letter dated 14 April 2005 referred to by the learned judicial commissioner in his grounds of judgment merely explained that due to the change of ownership in the land, tributes and premium are payable to the appellant. The letter made no mention of the continuation or adoption of the supply agreement by the appellant.

[17] Given the insufficient judicial appreciation of the evidence, we find this to be a proper case for appellate intervention (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). Further, we agree with learned counsel for the appellant that the interest awarded by the learned judicial commissioner was wrong in law. The judgment was dated 18 August 2011 by which time the law has been amended to provide for interest on judgment sum at the rate of 4%pa. In the circumstances, we allowed the appeal and made the orders as stated above.

Appeal allowed with costs.

Reported by Kanesh Sundrum